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IN THE

Supreme Court of the United States

October Term
1962

No. 520

HARLOW CHAMBERLIN, on his own behalf and in behalf of all others similarly situated,

Appellant,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, et al.,

Appellees,

vs.

DAVID HUME, et al.,

Intervening Appellees.

EDWARD RESNICK, PHILIP STERN, AND ELSIE THORNER, in their own behalf, and in behalf of all other persons similarly situated,

Appellants,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, et al.,

Appellees,

vs.

DAVID HUME, et al.,

Intervening Appellees.

MOTION OF APPELLEES, THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, ET AL., TO DISMISS.

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Appellees, The Dade County Board of Public Instruction, et al., pursuant to Rule 16 of the Revised Rules of this Court, move to dismiss those portions of the appeal embraced in questions (2) (c), (d) and (e) of the Appellants' questions presented on appeal upon the grounds (A) that the Appellants have no standing to raise the questions so presented, and (B) that there is no justiciable issue raised by the enumerated questions.

STATEMENT OF THE CASE

These are two separate actions challenging the constitutionality of a variety of alleged religious practices taking place in the schools of Dade County, Florida. The Appellant Chamberlin is the father of two children in the public schools of Dade County, one child being enrolled in the North Miami Elementary School and the other child enrolled in the North Miami High School as of the time of completion of the trial. The Appellant Thorner is the parent of a child in Sunset Elementary School and the Appellants Stern and Resnick are parents of children in Biscayne Elementary School. After a trial on the issues, Circuit Judge J. Fritz Gordon rendered his decision dismissing the complaint with relation to the conducting of religious and sectarian baccalaureate programs, the conducting of a religious census among the children to ascertain their own affiliation and the religious affiliation of their parents, and the conducting of religious tests as to the qualifications of teachers for employment. The Appellants took an appeal to the Supreme Court of Florida from the above-mentioned rulings and others of the Circuit Court. The Florida Supreme Court, *inter alia*, affirmed the lower Court as to its ruling on baccalaureate programs, religious census and religious tests for teachers.

The evidence at the trial reflected that the children of the Appellant parents were all enrolled in elementary schools except for the older Chamberlin child who was to be enrolled in North Miami Senior High School in the tenth grade at the time of completion of the trial. (TR 112). None of the children testified and neither the Appellant parents nor anyone else testified that the children of Appellants had been subjected to a religious census, as alleged in the complaint. The evidence did indicate that, as a rule, the permanent record filled out by parents or children, depending on age of child, reflects religious preference of the child (TR 537). The testimony of Appellant parents did not indicate that they or their children had filled out such a record. Evidence was adduced at the trial that certain questions as to religious preference were asked of pupils in Palmetto Senior High School (TR 1206) and in North Miami High School (TR 345, 378); however, there was no evidence connecting Appellants' children with these two isolated incidents. The record indicates that all of the Appellants were parents of children enrolled in the public schools of Dade County and does not establish that any of said parents were teachers in the Dade County School System, nor were the Appellants so designated in the pleadings.

The lower Court summarily dismissed the complaint with reference to the allegations of conducting religious tests as qualifications for the employment of teachers upon the ground that no teacher was a party to this cause. Therefore there has been no express ruling of the lower Court on the constitutionality of religious tests for teachers.

THE FEDERAL QUESTIONS NOT PROPERLY RAISED

Briefly stated, the questions presented by the Appellants which Appellees seek to dismiss are as follows:

> **(2) Are such provisions of the United States Constitution [the establishment of religion and free exercise clause of the First Amendment] violated by any or all of the following practices of the Appellee; Dade County Board of Public Instruction:**
>
> **. . . .**
>
> **(c) the conducting of religious and sectarian baccalaureate programs?**
>
> **(d) the conducting of a religious census among the children to ascertain their own religious affiliations and the religious affiliation of their parents?**
>
> **(e) the conducting of religious tests as a qualification for the employment of teachers?**

All of the questions so raised were improperly raised since the parents of the pupils had no standing to raise constitutional questions which did not affect them or their children, and consequently there is no justiciable issue raised by these points.

ARGUMENT

I. The Appellants have no standing to complain of the conducting of religious and sectarian baccalaureate programs.

The evidence in this case clearly indicates that all of the children involved here save one were enrolled in elementary schools of the Dade County Public School System. The other child, the child of the Appellant Chamberlin, was at time of trial a sophomore at North Miami High School. The evidence clearly indicates that baccalaureate programs are conducted only on graduation from high school. (TR 1086)

Appellants asserting constitutional rights have no standing to sue unless adversely affected. *Poe v. Ullman*, 367 U.S. 497, 503-504, 81A Sup.Ct. 1752, 1756 (1961); *Tileston v. Ullman*, 318 U.S. 44, 63 Sup.Ct. 493 (1943); *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 537, 61 Sup. Ct. 376, 378 (1941). A request for declaratory relief does not remove the requirement of standing. *Doremus v. Board of Education* 342 U.S. 429, 72 Sup. Ct. 394 (1952); *Coffman v. Breeze Corporation* 323 U.S. 316, 65 Sup. Ct. 298 (1945). The Supreme Court of the United States has long held that the rendering of advisory opinions is a "function never conferred upon it by the Constitution, and against the exercise of which this Court has steadily set its face from the beginning." *Muskrat v. United States*, 219 U.S. 346, p. 362 31 Sup. Ct. 250 (1911). The Appellants made no attempt in the trial of the case below to connect the practice complained of with their own children. None of the Appellants' children testified.

II. The Appellants have no standing to raise the question concerning the conducting of the religious census among the children to ascertain their own religious affiliation and the religious affiliation of their parents.

The evidence at the trial indicated that permanent records are kept in the school system showing, among other things, religious preferences of pupils and their parents. (Tr. 537). However, there is no testimony in the record to indicate that any of the Appellants or their children had such a card or record or supplied such information to any person in the School system. Testimony was submitted as to isolated incidents of a poll being taken of the religious beliefs of the pupils at Palmetto High School (Tr. 1205-1207) and another instance in which a teacher polled the children of a class in North Miami Senior High School as to their religious preferences. (Tr. 345, 378). However, there was no evidence submitted connecting the children of these Appellants with such isolated incidents. As in the present case, the State Court in *Doremus v. The Board of Education, supra*, rendered an opinion on a Federal constitutional problem under such circumstances as could only be regarded as advisory. As was said by this Court in *Doremus* in 342 U.S. at 439:

> "We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy', we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without

review, any procedure which does not constitute such."

The United States Supreme Court has held that it will not pass upon the constitutionality of a complaint of one who fails to show that he was injured by the operation of the statute or practice. *Coffman v. Breeze Corporation* 323 U.S. 316, 324-325, 65 Sup. Ct. 298, 303 (1945). Therefore since the Appellants have failed to connect their children with the taking of a religious census they cannot be heard to complain of the unconstitutionality of the practice as applied to others.

III. The Appellants have no standing to complain of the conducting of religious tests as a qualification for the employment of teachers.

The Appellants have no standing to question the constitutionality of asking prospective teachers whether they believe in God. Only teachers or applicants for teaching positions have the necessary justiciable interest to raise this issue. The Appellants have no standing to assert the rights of others. *Tileston v. Ullman* 318 U.S. 44, 63 Sup. Ct. 493 (1943); *Tyler v. Judges of the Court of Registration* 179 U.S. 405 21 Sup. Ct. 206 (1900). With regard to the question of religious tests for teachers, the lower Court has made no decision as to the constitutionality of the practice but rather has ruled from the inception that the Court had no question to decide since no teachers were Plaintiffs in this action. See Sup. Ct. Rule 16 (1) (b).

CONCLUSION

We respectfully submit, therefore, that the Appellants present no properly raised Federal question for the decision of this Court with regard to the questions (2) (c), (d) and (e) and that the Court should refuse jurisdiction of this portion of the appeal.

BOLLES & PRUNTY,
Attorneys for THE BOARD OF PUBLIC INSTRUCTION OF DADE COUNTY, FLORIDA

By George C. Bolles
George C. Bolles

PROOF OF SERVICE

I HEREBY CERTIFY that on the 16 day of November, 1962 I served a copy of the foregoing Motion to Dismiss upon the following counsel of record:

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